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The Not-So-Free Spirit of Coachella: Coachella's Overbearing Radius Clause and the Sherman Antitrust Act

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THE NOT-SO-FREE SPIRIT OF COACHELLA: COACHELLA’S OVERBEARING RADIUS CLAUSE AND THE SHERMAN ANTITRUST ACT

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I. INTRODUCTION

When enjoying a concert, it is easy to get caught up in the energy and excitement of seeing your favorite artist live. Behind the lights and sounds of a live performance lies a complex business that balances the interests of artists, promoters, and others working to bring artists to venues across the world. The live music industry has evolved from its simplistic roots, with business practices behind the music becoming equally advanced.¹

Music festivals in particular are popular among both concert-goers and promoters.² Coachella Valley Music Festival (“Coachella”) is one of the giants of the music festival industry, featuring over 170 performers and drawing crowds of up to 125,000 people per day.³ Along with massive festivals such as Coachella, there are also smaller and less polarizing festivals with limited resources.⁴

In the live music industry, a typical radius clause stipulates that a performer cannot play any other shows within a certain geographic radius around the promoter’s event for a fixed period of time.⁵ In 2018, the business

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1. See, e.g., Robert W. Hayes, *Rock May Never Die, But It Sure Has Matured*, DEL. LAW. 20, 20–21 (2017) (discussing the music industry’s corporatization and progression towards a monetary focus on live performances).

2. See Jeremy A. Gogel, *Antitrust Concerns with Respect to Music Festival Radius Clauses*, 38 LINCOLN L. REV. 87, 87 (2011) (stating that music festivals gained popularity following the 1969 Woodstock festival).

3. Second Am. Compl. ¶ 28, *Soul’d Out Prods., LLC v. Anschutz Entm’t Grp., Inc.*, No.3:18-cv-00598 (D. Or. Apr. 9, 2018) (explaining that Coachella is held at the Empire Polo Club in Indio, California and over 1000 miles from Portland, Oregon where Soul’d Out’s festival is held); Bruce Fessier, *Coachella 2018, The Year Beyoncé Reigned, Was a Historic Moment for the Festival*, USA TODAY (last updated Apr. 23, 2018, 11:19 AM), <https://www.usatoday.com/story/life/music/2018/04/23/coachella-2018-recap-beyonce-historic-success/541837002/> (discussing Coachella’s success in 2018).

4. See Second Am. Compl., *supra* note 3, ¶¶ 5–7 (explaining that under Coachella’s Radius Clause artists are prevented from performing at any small festival within the clause’s geographic confines).

5. See Gogel, *supra* note 2, at 104 (stating that artists are required to sign radius clauses in exchange for the opportunity to perform at large music festivals, preventing them from freely touring around the festival’s date).

practices behind large music festivals such as Coachella developed as part of the public consciousness.⁶ Two lawsuits condemning the use of radius clauses attracted the public's attention.⁷ Soul'd Out Productions ("Soul'd Out"), a small festival promoter, brought a lawsuit criticizing Coachella's use of an overbearing radius clause in its contracts with artists.⁸ Prior to Soul'd Out's lawsuit against Coachella, Eagle Theater Entertainment ("Eagle") brought a lawsuit against SFX React-Operating ("React") with a similar claim.⁹

Coachella's Radius Clause restricts artists slated to perform at the event from performing at other music festivals surrounding Coachella before and after their performance.¹⁰ React's radius clause similarly restricts artists from freely playing in the vicinity of the venue.¹¹ Both Soul'd Out and Eagle alleged that the overbearing radius clauses used by Coachella and React violated Section 1 of the Sherman Antitrust Act ("Sherman Act") that guards against monopolies or activities that restrict commerce.¹²

This Comment will focus on analyzing *Soul'd Out Productions, LLC v. Anschutz Entertainment Group, Inc.*,¹³ and *SFX React-Operating LLC v. Eagle Theater Entertainment, LLC*.¹⁴ Part II will discuss the Sherman

6. See, e.g., Katie Bain, *How the Music Industry Uses a Pervasive Secret Weapon to Keep Bands from Freely Touring*, LA WEEKLY (Apr. 18, 2017, 6:23 AM), <https://www.laweekly.com/music/how-music-festival-promoters-use-radius-clauses-to-keep-bands-from-freely-touring-8140333> (explaining that radius clauses have expanded in geographic scope over the past few years as the result of the increase in earning potential and business opportunities associated with music festivals).

7. See, e.g., Dave Brooks, *Coachella's Radius Clause Details Exposed in Legal Fight With Oregon Festival*, BILLBOARD (June 20, 2018), <https://www.billboard.com/articles/news/festivals/8462036/coachella-radius-clause-details-exposed-lawsuit-oregon-festival> (detailing the allegations against Coachella's use of an overbearing Radius Clause); Ann-Derrick Gaillot, *Radius Clauses Are the Least Rock and Roll Thing in Music*, THE OUTLINE (Apr. 11, 2018, 9:44 AM), <https://theoutline.com/post/4129/coachella-radius-clause-lawsuit?zd=1&zi=ed6jrpb2/> (discussing Eagle Theater Entertainment's lawsuit against SFX React-Operating regarding its radius clause).

8. See Second Am. Compl., *supra* note 3, ¶¶ 5–6; Brooks, *supra* note 7.

9. Compare *SFX React-Operating LLC v. Eagle Theater Entm't, LLC*, No. 16-13311, 2017 U.S. Dist. LEXIS 134820, at *8–10 (E.D. Mich. Aug. 23, 2017) (bringing breach of contract, unjust enrichment, and RICO claims), with Second Am. Compl., *supra* note 3, ¶ 1 (alleging violations of "antitrust, unfair competition, tortious interference, and unlawful restraint on trade").

10. See Second Am. Compl., *supra* note 3, ¶¶ 5–6.

11. See *SFX React-Operating LLC*, 2017 U.S. Dist. LEXIS 134820, at *6 n.1.

12. 15 U.S.C. § 1 (2018).

13. See generally Second Am. Compl., *supra* note 3 (detailing allegations of the lawsuit).

14. See generally *SFX React-Operating LLC*, 2017 U.S. Dist. LEXIS 134820, at *1 (alleging violations of breach of contract, breach of fiduciary duty, and unjust

Antitrust Act as it relates to radius clauses, and Part III will analyze Coachella's and React's radius clauses and suggest that Coachella's Radius Clause is a per se violation of Section 1, in disagreement with the district court's dismissal of Soul'd Out's antitrust claims. Part IV will go on to recommend a modified test for radius clauses in the live music industry and make an argument for increased use of the quick look analysis.

II. RADIUS CLAUSES AND THE SHERMAN ANTITRUST ACT

a. *The Sherman Antitrust Act*

The Sherman Antitrust Act is a federal statute that prevents formation of monopolies or activities that restrict commerce.¹⁵ Section 1 of the Sherman Act states that a contract that restrains trade amongst states is illegal.¹⁶ Section 1 only applies to activity between separate entities, which means that it does not apply to acts between parent companies and their "wholly owned subsidiaries" because of their "complete unity of interest."¹⁷ To prove a violation of Section 1 of the Sherman Antitrust Act, one must typically show an agreement that affects interstate commerce and unreasonably restrains trade.¹⁸ Restraints on trade that violate the Sherman Act fall into two categories: vertical or horizontal.¹⁹ A horizontal restraint is an "agreement between competitors at the same level of the market structure."²⁰ Vertical restraints are agreements between individuals at different market levels.²¹ Three elements that must be met to establish a violation of Section 1 include: (1) "a contract, combination or conspiracy," (2) "affecting interstate commerce" that (3) "imposes an unreasonable restraint on trade."²² To analyze such violations, the courts typically use either the rule of reason test or per se violation analysis.²³

enrichment).

15. 15 U.S.C. § 1.

16. *Id.*

17. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 776 (1984).

18. *See, e.g.,* White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983) (citations omitted) (discussing the requirements that constitute a violation Section 1 of the Sherman Antitrust Act).

19. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) ("[A]n agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure . . . which are termed 'vertical' restraints.").

20. *Id.*

21. *Id.*

22. *White & White, Inc.*, 723 F.2d at 504.

23. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4–5 (1958); *In re Cardizem CD*

i. *The Rule of Reason*

Section 1 inquiries can be decided under either the rule of reason test or *per se* violations.²⁴ Most restraints are analyzed under the rule of reason, which “requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.”²⁵ In contrast, when a restraint on trade “always or almost always” restricts interstate competition, it is categorized as a *per se* violation of Section 1.²⁶

In *Ohio v. American Express Co.*,²⁷ the Supreme Court applied the rule of reason analysis and held that American Express’s antisteering provisions did not violate the Sherman Antitrust Act.²⁸ To combat merchants diverting business from American Express, the company included “antisteering” provisions in its contracts with merchants.²⁹ The Court applied the rule of reason test because both parties agreed that American Express’s antisteering provision was a vertical restraint on trade, meaning that it was “imposed by agreement between firms at different levels of distribution.”³⁰ Ultimately, the Supreme Court held that the plaintiffs did not prove that the antisteering provisions had anticompetitive effects.³¹

Similarly, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,³² the Supreme Court held that the rule of reason was an appropriate test to be applied.³³ Respondent claimed that petitioner ceasing sales in respondent’s stores due to respondent’s policy to “refus[e] to sell to retailers that discount

Antitrust Litig., 332 F.3d 896, 906–07 (6th Cir. 2003); *see also* Cal. Dental Ass’n v. FTC, 526 U.S. 756, 769–70 (1999) (discussing the applicability of different tests in trade restraint claims).

24. *See In re Cardizem CD Antitrust Litig.*, 332 F.3d at 906; *see also N. Pac. Ry. Co.*, 356 U.S. at 4–5 (explaining that violations of the Sherman Act can be analyzed under the rule of reason).

25. *White & White, Inc.*, 723 F.2d at 505.

26. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

27. 138 S. Ct. 2274 (2018).

28. *See id.* at 2280, 2283–84 (highlighting that American Express included antisteering provisions in its contracts, which prevented merchants from “steering” customers away from paying with American Express to avoid its higher fees).

29. *See id.* at 2280.

30. *Id.* at 2284.

31. *See id.* at 2290, 2303 (explaining that the plaintiffs did not meet the burden of proof required to show that American Express’s antisteering effects were competitive in nature because they “stem[med from] negative externalities in the credit-card market and promote Interbrand competition”).

32. 551 U.S. 877 (2007).

33. *Id.* at 877.

[its] goods below suggested prices” constituted a violation of Section 1.³⁴ The Court reasoned the respondent’s “rel[iance] on pricing effects absent a further showing of anticompetitive conduct” did not rise to the level of a per se violation.³⁵ Though the Court recognized “[t]he rule of reason as the accepted standard for testing whether a practice restrains trade in violation of [Section] 1,” it clarified that the “rule of reason does not govern all restraints.”³⁶

In *Brantley v. NBC Universal, Inc.*,³⁷ the Ninth Circuit applied the rule of reason test in a class action lawsuit brought by consumers alleging that defendants, television programmers, exploited their full or partial ownership of broadcast and cable channels by requiring consumers to purchase “prepackaged tiers” of the bundled channels.³⁸ Both parties had agreed that the rule of reason analysis was appropriate.³⁹ However, despite its common application, the rule of reason test has been criticized as vague and costly, which can make it difficult for plaintiffs to prevail.⁴⁰

ii. *The Per Se Rule*

Per se violations of Section 1 occur when a restraint on trade “facially appears to be one that would always or almost always tend to restrict competition and decrease output.”⁴¹ Consequently, the per se rule is applied to restraints that would “always or almost always tend to restrict competition or decrease output.”⁴² The per se rule is appropriate when courts can predict “with confidence that the restraint would be invalidated in . . . almost all instances under the rule of reason.”⁴³

Vertical restraints are generally found to be per se illegal under Section 1,

34. *Id.* at 883.

35. *See id.* at 895–96 (reasoning that the respondents did not address that the interests of manufacturers and consumers are similar with regard to profits margins).

36. *Id.* at 885–86.

37. 675 F.3d 1192 (9th Cir. 2012).

38. *See id.* at 1195–96 (explaining that plaintiffs’ further allegations include that the bundling resulted in leaving consumers with only the option to purchase packages consisting of bundled channels from a sole programmer, thus impairing competition between program television distributors).

39. *Id.* at 1197.

40. *See, e.g.,* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1461–65 (2009) (demonstrating that the rule of reason test is expensive, inaccurate, and time consuming).

41. *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979)).

42. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 876 (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

43. *Id.* at 886–87.

unless there is some agreement on price between the market participants.⁴⁴ In addition to price-fixing, non-price horizontal restraints that allocate territories, reduce output, or divide up customers are also found to be per se illegal, along with “[h]orizontal group boycotts by competitors with shared market power.”⁴⁵ Other restraints may be brought under the per se rule if they cause destructive anticompetitive effects and lack any procompetitive effects.⁴⁶ Though the per se rule does not require an elaborate inquiry into the relevant industry to find illegality, the term is not as fixed as it appears.⁴⁷ Before a restraint can be deemed per se illegal, “considerable inquiry into market conditions may be required.”⁴⁸

In *United States v. Topco Associates, Inc.*,⁴⁹ the Supreme Court found that Topco’s market-dividing scheme, which granted its members licenses that allowed them to restrict competition in their territory, was a per se violation of Section 1.⁵⁰ Topco, a cooperative association of supermarket chains, was charged with conspiring with its members through an agreement to “sell Topco-controlled brands only within the marketing territory allocated to it, and [to] refrain from selling Topco-controlled brands outside such marketing territory.”⁵¹

Tying arrangements have also been found to be per se violations of the Sherman Act.⁵² A tying arrangement occurs when a party agrees to sell one product on a condition that the buyer also purchases a “tied” product or agrees not to buy the product from another seller.⁵³ When tied products

44. See *Bus. Elecs. Corp.*, 485 U.S. at 735–36 (explaining that a vertical restraint must include a price agreement to constitute a per se violation of Section 1 of the Sherman Act).

45. WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:9 (2011), Westlaw ANTITRHBK (updated Nov. 2018).

46. See *id.* (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)) (“Other concerted activities may at least in theory be brought under the per se banner, if shown to have a particularly ‘pernicious effect on competition’ and to lack ‘any redeeming virtue.’”).

47. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779–80 (1999); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (“[A]greements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are ‘illegal *per se*.’”).

48. *Id.* (quoting *Nat’l Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)).

49. 405 U.S. 596 (1972).

50. See *id.* at 611–12.

51. *Id.* at 601, 610–11 (discussing Topco’s ability to give its members the right to decide if “competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.”).

52. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (stating that tying arrangements are “unlawful in and of themselves”).

53. *Id.* at 5–6.

impede competition by limiting a buyer's choice, thus denying access to the market for no reason other than suppression, they are per se unlawful under Section 1 of the Sherman Act.⁵⁴ For a tying arrangement to be unreasonable, the seller must have significant dominance over the market.⁵⁵ In *Northern Pacific Railway Co. v. United States*,⁵⁶ the Supreme Court held that Northern Pacific Railway Co.'s "preferential routing clause" was a per se violation of the Sherman Act.⁵⁷ The preferential routing clause in question forced the lessees of the railway's land to use Northern Pacific to ship all items they manufactured.⁵⁸ As most products were shipped over state lines, this arrangement affected interstate commerce.⁵⁹

In contrast, the Supreme Court in *Illinois Tool Works Inc. v. Independent Ink Inc.*⁶⁰ found no tying arrangement where defendants did not have market power in the tied products.⁶¹ Petitioners manufactured printing systems that contained patented ink containers and printheads, along with unpatented corresponding ink.⁶² Petitioners had an agreement with the manufacturers to only fill the petitioners' containers with their corresponding unpatented ink.⁶³ Respondents created an ink with the same chemical composition as the petitioners' ink and filed a suit alleging that petitioners were tying the unpatented ink with the patented products.⁶⁴ The Supreme Court held that patent ownership did not automatically give a patentee market power and that showing of market power is necessary to prove a tying arrangement.⁶⁵

54. See *id.* at 3, 8 (holding that appellant railroad companies' land lease contracts containing "preferential routing" clauses, which required the "grantee or lessee to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers" were per se violations of Section 1).

55. See, e.g., *id.* at 6–7. But see *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006) (noting the decline in the Court's "strong disapproval of tying arrangements" and instead requiring a showing of market power to prove an illegal tying arrangement).

56. 356 U.S. 1 (1958).

57. *Id.* at 3, 8.

58. See *id.* at 3.

59. See *id.*

60. 547 U.S. 28 (2006).

61. *Id.* at 45–46 (stating that a patent holder does not automatically gain market power through said patent).

62. See *id.* at 31.

63. See *id.* at 32 (stating that petitioners' original infringement suit was dismissed, and respondents subsequently filed a suit claiming a violation of Section 1 of the Sherman Act through tying).

64. *Id.*

65. See *id.* at 45–46 (holding that respondents must produce relevant evidence of the petitioner's alleged market power).

b. *Radius Clauses*

Radius clauses in the live music industry restrict the artist's ability to work, similar to non-compete clauses in employment contracts.⁶⁶ Radius clauses have also been classified as a type of restrictive covenant.⁶⁷ A restrictive covenant is a private agreement between two parties that prevents a party from taking a specific action.⁶⁸

i. *Non-compete Clauses in Employment Contracts*

Non-compete clauses in employment contracts generally restrict employees from working for another employer for a certain time period or in a set geographic location.⁶⁹ When geographic restrictions are present in non-compete clauses, courts analyze the scope of the area covered.⁷⁰ Courts consider the overall combination of factors to determine the validity of a non-compete clause.⁷¹ Non-compete clauses that contain unlimited or broad restrictions on geographic areas are likely to be found unreasonable; however, courts are often reluctant to deem these clauses per se unenforceable for geographic reasons alone and prefer to apply a reasonableness test instead.⁷² Courts analyze time restrictions similarly to geographic restrictions and rely on a fact-dependent reasonableness test.⁷³

Enforcement of strict non-compete clauses in the employment context is

66. See Gogel, *supra* note 2, at 104 (explaining that both radius clauses and non-compete clauses in employment contracts are types of restrictive covenants that prevent employees from competing with an employer after their employment is terminated).

67. See *id.* at 88–89 (asserting that radius clauses used in commercial leasing are restrictive covenants because they prevent tenants from freely operating outside of a lease).

68. See Beth R. Minear & Eric R. Waller, *Common Law of Restrictive Covenants*, 28 ENERGY & MINERAL L. FOUND. § 15.02 (2007).

69. See *Restrictive Covenants in the Employment Context*, 285 CORP. COUNS. PRIMERS NL 1, SEPT. 2017, at 2 [hereinafter *Corporate Counsel*].

70. See *id.* at 11; see also *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 899 (Minn. 1965) (explaining that courts look at whether a restraint is required to protect the employer and whether it restrains the employee more than “reasonably necessary” to achieve that protection).

71. See *Corporate Counsel*, *supra* note 69, at 31 (citing *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975)) (stating the factors considered in determining the validity of a non-compete clause, which include the employee's possession of trade secrets, whether the employee is a customer's only contact, and time and distance restrictions).

72. See *id.*; see also *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) (stating reluctance to deem a non-compete clause without an unlimited geographic restriction as per se unreasonable).

73. See *Corporate Counsel*, *supra* note 69, at 24 (asserting that a circumstance specific reasonableness test should be used to deal with time restrictions).

associated with “both lower wage growth and lower initial wages.”⁷⁴ Additionally, it can lead to decreased mobility of workers throughout an industry, which can stifle economic growth.⁷⁵

ii. *Radius Clauses in the Live Music Industry*

In the live music industry, performers often sign contracts containing a radius clause.⁷⁶ A typical radius clause stipulates that a performer cannot play at any other show within a certain radius of the promoter’s event for a fixed period of time.⁷⁷ The live music industry’s movement towards corporatization has flowed naturally from the increasing popularity of concerts.⁷⁸ Along with Coachella, other major music festivals, such as Lollapalooza and Bonnaroo, also utilize radius clauses.⁷⁹ Though the clauses differ in some respects, each festival requires the artist to accept them to have an opportunity to perform.⁸⁰

Smaller acts and regional venues and workers bear most of the harm caused by overly restrictive radius clauses.⁸¹ In 2010, Lollapalooza’s radius clause that “restrict[ed] bands from playing 180 days before and 90 days after Lollapalooza within a 300-mile radius” became subject of an investigation by the Illinois Attorney General for “potential antitrust violations.”⁸² Lollapalooza held the exclusive power to grant exceptions; and popular

74. OFFICE OF ECONOMIC POLICY, U.S. DEP’T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 19 (Mar. 2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

75. See *id.* at 19–20 (explaining that potential effects of non-compete enforcement can have negative effects beyond the individual level).

76. See Gogel, *supra* note 2, at 104 (discussing the exclusivity agreements imposed on artists by promoters of major music festivals).

77. See *id.* (“Promoters of every major American music festival force the acts slated to perform at their events to sign an exclusivity, or radius, clause, which forbids these acts from performing anywhere near the festival several months before and after the event.”).

78. See Hayes, *supra* note 1, at 20–21 (discussing how improvements in recording and listening quality inspired the current willingness to pay for a live music experience).

79. See Gogel, *supra* note 2, at 105.

80. See *id.* at 105–06 (discussing the ramifications of refusing to sign a radius clause, including preventing artists from performing for large audiences).

81. See, e.g., Bain, *supra* note 6 (“[F]or smaller bands that depend on touring revenue, agreeing to a radius clause means being elbowed out of markets for long periods of time and grinding harder to make ends meet, in exchange for the slim hope that a daytime slot at a mega-festival might make them the next Arcade Fire or Daft Punk.”).

82. Josh Wright, *Lollapalooza and Antitrust*, TRUTH ON THE MKT. (June 28, 2010), <https://truthonthemarket.com/2010/06/28/lollapalooza-and-antitrust/>.

artists were less likely to avoid the restrictions.⁸³ The investigation resulted in little else other than awareness that these clauses exist.⁸⁴

iii. *Coachella's Radius Clause: Soul'd Out Prod., LLC v. Anschutz Entm't Grp., Inc.*

Coachella takes place each year in Indio, California, over two weekends in April.⁸⁵ The festival draws crowds of 125,000 people per day⁸⁶ with ticket prices starting at \$429 in 2018.⁸⁷ Coachella's Radius Clause is a "part of its standard agreements with artists"; it explicitly forbids artists from "performing at any other festival or themed event within a distance that extends over 1300 miles" including "California, Nevada, Oregon, Washington[, and] Arizona from December 15, 2017, until May 7, 2018."⁸⁸

Oregon-based Soul'd Out brought a lawsuit against Coachella for alleged anticompetitive behavior.⁸⁹ Soul'd Out's complaint states that Coachella's Radius Clause is a per se violation of Section 1 because it ties together "open-air music festivals," "hard-ticket concert performances," and "themed events."⁹⁰ Soul'd Out further claims that Coachella and its promoters have "substantial economic power" in the tied markets.⁹¹ On March 14th, 2019, the district court dismissed Soul'd Out's antitrust claims.⁹²

83. Joel Rose, *Lollapalooza Investigated by Illinois Attorney General*, NPR MUSIC (Aug. 4, 2010, 4:04 PM), <https://www.npr.org/sections/therecord/2010/08/04/128982880/lollapalooza-undergoing-investigation-by-illinois-attorneygeneral>.

84. See, e.g., Karen Gwee, *Music Festivals and the Pursuit of Exclusivity*, CONSEQUENCE OF SOUND (Sept. 26, 2016, 12:00 AM), <https://consequenceofsound.net/2016/09/music-festivals-and-the-pursuit-of-exclusivity/>.

85. Josh Johnson & Lesley Messer, *What is Coachella? Everything to Know About the Music Festival*, ABC NEWS (Apr. 13, 2018, 6:56 AM), <https://abcnews.go.com/GMA/Culture/coachella-music-festival/story?id=54404096>.

86. George Varga, *Coachella 2018 Preview: Beyoncé, Eminem, The Weeknd, New Food Court, Drones and a New Emoji*, THE SAN DIEGO UNION-TRIB. (Apr. 12, 2018, 6:05 AM), <http://www.sandiegouniontribune.com/entertainment/music/sd-et-music-coachella-20180412-story.html>.

87. Megan Leonhardt, *What It Really Costs to Go to Coachella 2018*, MONEY: EVERYDAY MONEY (Mar. 29, 2018), <http://time.com/money/5217998/cost-coachella-2018-beyonce/>.

88. Second Am. Compl., *supra* note 3, ¶¶ 33, 36.

89. See *id.* ¶¶ 1–2 (stating that Soul'd Out brought a lawsuit against Coachella along with codefendants Anschutz Entertainment Group, Inc., The Anschutz Corporation, Goldenvoice, LLC, and AEG Presents, LLC).

90. See *id.* ¶ 163 (explaining AEG's power to tie both the national and local markets for "open air music festivals," "hard-ticket concert performances," and "themed events").

91. *Id.*

92. See *Soul'd Out Prod., LLC v. Anschutz Entm't Grp., Inc.*, No. 3:18-cv-00598-MO, 2019 WL 1212085, at *2 (D. Or. Mar. 14, 2019); see also Nadia Dreid, *Coachella Escapes Rival's Antitrust Suit for Second Time*, LAW360 (Mar. 14, 2019, 3:29 PM),

iv. *React's Radius Clause: SFX React-Operating LLC v. Eagle Theater Entertainment, LLC*

The second case, *SFX React-Operating LLC v. Eagle Theater Entertainment, LLC*, involves two promoters in the Electronic Dance Music (“EDM”) market and has gained far less media attention.⁹³ React required artists to sign a contract with a radius clause that prohibited artists “from playing anywhere up to within a 500 mile radius of React’s event for periods of 60, 90, or 120 days prior to and following the date of the event.”⁹⁴ Eagle alleged that the radius clause was a per se violation of Section 1 of the Sherman Act.⁹⁵ Eagle alleged that the radius clause made it “nearly impossible for many nationally recognized EDM artists to play anywhere else in the Midwest.”⁹⁶ Ultimately, the radius clause was not found to be a per se violation of the Sherman Antitrust Act.⁹⁷ As of February 15th, 2019, both parties settled, and the claims were subsequently dismissed.⁹⁸

III. COACHELLA’S RADIUS CLAUSE VIOLATES SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act states that “[e]very contract . . . in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal,” making it applicable to Coachella’s Radius Clause that is included in most of its contracts with artists.⁹⁹ In contracting to perform at Coachella, artists must agree to adhere to the limitations set forth by the Clause.¹⁰⁰ Further, the Radius Clause involves activities between separate entities — the promoters and the acts — to which Section 1 of the Sherman Act applies, rather than the promoters and wholly-owned

<https://www.law360.com/articles/1138753> (discussing the District of Oregon’s finding that Soul’d Out failed to prove Coachella’s had the necessary market power to stifle competition).

93. See *SFX React-Operating LLC v. Eagle Theater Entm’t, LLC*, No. 16-13311, 2017 WL 3616562, at *2 (E.D. Mich. Aug. 23, 2017).

94. *Id.*

95. *Id.* at *5–6.

96. *Id.* at *2.

97. See *id.* at *7 (holding that defendants did not allege facts necessary to find React’s radius clause to be anticompetitive under the per se analysis).

98. Stipulation and Order of Dismissal of All Claims 1–2, ECF No. 59.

99. 15 U.S.C. § 1 (2018); Second Am. Compl., *supra* note 3, ¶ 37 (discussing the strict limitations imposed on artists by Coachella’s Radius Clause and the effects of those limitations).

100. See Second Am. Compl., *supra* note 3, ¶¶ 5–6 (highlighting that Coachella invites artists to perform, but only on strict condition that they agree to certain terms including a radius clause that restricts the ability of artists to perform or advertise other performances besides Coachella).

subsidiaries.¹⁰¹

The practice of using radius clauses meets the three elements required to establish a violation of Section 1, including: (1) “a contract,” (2) “affecting interstate commerce” that (3) “imposes an unreasonable restraint on trade.”¹⁰² Specifically, Coachella’s Radius Clause is present in performance contracts with artists.¹⁰³ The Clause, which extends over 1,300 miles across California, Nevada, Oregon, Washington, and Arizona, severely impacts interstate commerce because it diminishes an already small pool of touring artists by controlling over a hundred performers who play the event over each of the two weekends.¹⁰⁴ This restriction on performing in multiple states that impacts such a large number of artists unreasonably restrains the market for live performers.¹⁰⁵

a. Coachella’s Radius Clause is a Horizontal Restraint on Trade

Soul’d Out claims that Defendants have engaged in horizontal trade restraint by carving out exceptions to its Radius Clause for competing festivals in its 1300-mile restriction.¹⁰⁶ Though the practice of dividing the market among competitors does not explicitly involve price fixing, it does reduce output and divide market power.¹⁰⁷ Similar to *United States v. Topco Assoc.*, where Topco, an association of supermarket chains, divided the relevant market by conspiring with its members to only sell Topco-controlled brands within specified territories, Anschutz Entertainment Group, Inc. (“AEG”), Coachella’s promoter, is working with other promoters of large

101. See *id.* ¶¶ 34–36; see also *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 777 (1984) (“Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. [T]he Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can ‘combine’ or ‘conspire’ under [Section 1 of the Sherman Act.]”).

102. *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983).

103. Second Am. Compl., *supra* note 3, ¶¶ 33–36.

104. See *id.* ¶¶ 152–53; see also Raisa Bruner, *Everything You Need to Know About Coachella 2018*, TIME (Mar. 27, 2018), <http://time.com/5216002/coachella-2018/> (stating that in 2018, Coachella included over one hundred artists throughout the entirety of its five-stage festival).

105. Second Am. Compl., *supra* note 3, ¶ 177 (alleging that Coachella’s Radius Clause “results in a decrease in the quality of festivals, a decreased supply of artists for both open air festival performances and also hard-ticket sales, and the shutdown of concert venues within the scope of the radius.”).

106. See *id.* ¶¶ 178, 241 (explaining that only large and widely known festivals in competition with Coachella, including SXSW and Ultra Music Festival, were exempted from Coachella’s radius clause).

107. See, e.g., *id.* ¶¶ 183–84; HOLMES, *supra* note 45, at 2.

open-air festivals to divide the market.¹⁰⁸ By dividing the market for music festivals, Coachella is engaged in a horizontal restraint on trade similar to Topco's, which constitutes a per se violation of Section 1.¹⁰⁹ Along with a horizontal restraint on trade, AEG has created tying arrangements, which have also been found to be per se violations of the Sherman Act.¹¹⁰

b. Coachella and AEG's Tying of Open-Air Festivals and Hard-Ticket Sale Events is a Violation of Section I

Soul'd Out's allegation that defendants violated Section 1 through tying "open-air music festivals," "hard-ticket concert performances," and "themed events" comports with prior case law regarding the practice of tying.¹¹¹ Soul'd Out alleges that AEG's restriction on playing "any other festival or themed event" prevents performances in any other venue except those that would potentially benefit AEG and comport with the Supreme Court's definition of tying set in *Northern Pacific Railway Co. v. United States*.¹¹² Like in *Northern Pacific Railway Co.*, where the defendant railroad company tied two markets by including a clause in its land-leasing contracts that forced lessees to ship any products produced on the leased lands over its lines, Coachella and its promoters are tying "open-air music festivals," "hard-ticket concert performances," and "themed events."¹¹³ Consequently,

108. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 601–02 (1972); Second Am. Compl., *supra* note 3, ¶ 241; see also *Iowa Pub. Emp.'s Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 340 F. Supp. 3d 285, 318 (S.D.N.Y. 2018) (holding that defendant's horizontal agreement to boycott new stock loan market entrants qualifies as a per se violation of the Sherman Act). But see *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) (holding that the per se group boycott rule does not apply to a single buyer's decision to buy from one seller rather than another).

109. See Second Am. Compl., *supra* note 3, ¶ 240 ("AEG has engaged in a horizontal restraint of trade, carving up the festival market with its competitors."); see, e.g., *Topco Assocs., Inc.*, 405 U.S. at 608 (holding Topco's horizontal restriction to be a per se violation of the Sherman Act).

110. See Second Am. Compl., *supra* note 3, ¶ 278 (explaining that AEG's economic power along with Coachella's alleged tying arrangement forces artists into signing Coachella's Radius Clause).

111. See *id.* ¶ 283 ("Effectively, if an artist performs at Coachella, that artist is required to use AEG's concert promotion business or venues if he or she wants to perform within the radius—a period that effectively lasts for months and that stretches thousands of miles beyond Coachella's local market.").

112. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958) (defining a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.").

113. See *id.* at 3, 6 (reasoning that the defendant railroad's practice of forcing lessees to ship products manufactured on its land over its railways substantially affected interstate commerce); see also Second Am. Compl., *supra* note 3, ¶ 155 (explaining

Coachella is preventing artists from performing at more than just open-air festivals.¹¹⁴

A restraint is found to be a per se violation of Section 1 of the Sherman Act after a “considerable inquiry” into relevant market conditions.¹¹⁵ AEG’s tying arrangement is unreasonable because of its dominance over both the open-air festival market and the market for hard-ticket sales and themed events.¹¹⁶ Coachella’s status as one of the largest music festivals in the world coupled with its ability to enforce its overbearing Radius Clause is representative of its power in the open-air festival market.¹¹⁷ According to *Soul’d Out*, this market dominance extends into “hard-ticket sales in the Pacific Northwest” by tying artists’ rights to performances in the Pacific Northwest to performances at AEG venues or AEG’s concert promotion business.¹¹⁸

AEG’s tying arrangement differs from the alleged tying arrangement in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, where the respondents did not establish market power.¹¹⁹ In AEG’s case, there is no patent at issue, and its market dominance is exemplified by Coachella’s status as one of the

AEG’s ability to use its market power to limit artist availability).

114. See *N. Pac. Ry. Co.*, 356 U.S. at 3, 11–12 (holding that appellant rail road companies’ land lease contracts containing “preferential routing” clauses, which required the “grantee or lessee to ship over its lines all commodities produced or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers,” were per se violations of Section 1); Second Am. Compl., *supra* note 3, ¶¶ 284, 287 (explaining that the manipulation of artists performances outside of Coachella extends to other markets because AEG’s definition is broad and inclusive of smaller festivals that do not directly compete with Coachella).

115. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779–80 (1999) (Breyer, J., concurring in part and dissenting in part) (citing *Nat’l Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)).

116. See *N. Pac. Ry. Co.*, 356 U.S. at 6–7 (noting that the preferential routing clauses are unlawful restraints on trade because of the extensive landholdings, which create a substantial restriction on interstate commerce); see also *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006) (showing of market power required to show illegality of tying arrangements).

117. See Second Am. Compl., *supra* note 3, ¶¶ 164–65 (stating that the power of Coachella, and therefore AEG, allows the company to force tying where there is no benefit for the artist, consumer, or the festival, but would benefit AEG’s other interests); Ashley Rayner, *The 25 Biggest Music Festivals Around the World in 2018*, THE TRAVEL (June 29, 2018), <https://www.thetravel.com/the-25-biggest-music-festivals-around-the-world-in-2018/> (noting the transformation Coachella has undergone from indie music festival to a major event attracting big industry names such as Beyoncé and Lady Gaga).

118. See Second Am. Compl., *supra* note 3, ¶¶ 156, 168 (explaining that AEG owns two venues in Seattle which seat less than 2,000 people, along with a larger music festival that takes place in Seattle and its own ticketing agency).

119. See *Ill. Tool Works Inc.*, 547 U.S. at 45–46 (holding that the holder of a patent does not automatically give the patentee market power).

largest music festivals in the world and extends to the market for hard-ticket sales.¹²⁰ The egregious effects of AEG's tying arrangement on the market, such as lost profits and inability of artists to form relationships with promoters, differentiate it from other restrictions, such as restrictive covenants in property law and non-compete clauses.¹²¹

c. Departure from Restrictive Covenants and Non-compete Clauses

While Coachella's Radius Clause may resemble restrictive covenants in property law, it differs in key aspects.¹²² Radius clauses in commercial leasing agreements prevent tenants from operating certain retail businesses in the same area as the anchor tenant,¹²³ while radius clauses in the live festival market prevent hundreds of artists from performing across several states.¹²⁴

The similarities between Coachella's Radius Clause and non-compete clauses in employment contracts, which are analyzed under the rule of reason, include the restrictions both place on the party's ability to work.¹²⁵ Employment non-compete clauses generally affect a single employee after his or her departure, while Coachella's Radius Clause applied to over 170 acts in 2018, thus affecting the freedom of over 100,000 consumers to choose when and where they can see the artists perform.¹²⁶ Further, the decreased economic growth and mobility throughout the market caused by strict enforcement of non-compete clauses are increased exponentially in the case of Coachella's Radius Clause due to the long list of artists restricted from performing within the Clause's broad geographic reach.¹²⁷

120. See, e.g., Second Am. Compl., *supra* note 3, ¶ 168 (highlighting AEG's ownership of smaller venues throughout Seattle along with its own ticketing company).

121. See *id.* ¶¶ 156, 159 ("Soul'd Out Productions has been damaged through the loss of profits from performances by artists who wanted to perform at the Soul'd Out Music Festival but were pressured not to by AEG, relying on the Radius Clause[,] along with its reduced ability to develop ongoing relationships with artists . . ."). See generally *Corporate Counsel*, *supra* note 69 (discussing restrictive covenants in non-competes).

122. See Gogel, *supra* note 2, at 87–88 (analogizing radius clauses in the live music industry to radius clauses in other industries).

123. See *id.* at 88–89 (explaining that radius clauses are used as tools to protect the value of a lease).

124. Second Am. Compl., *supra* note 3, ¶¶ 4, 7, 9.

125. See *Corporate Counsel*, *supra* note 69, at 18; Gogel, *supra* note 2, at 89.

126. See generally Fessier, *supra* note 3 (discussing the attendance at Coachella in 2018).

127. See *id.*; OFFICE OF ECONOMIC POLICY, *supra* note 74.

d. *Soul'd Out's Allegations and the Rule of Reason*

Coachella's Radius Clause also differs from other types of restraints that courts usually analyze under the rule of reason.¹²⁸ Applying the rule of reason would require further inquiry into whether, under all of the circumstances present in the case, a restraint poses a restriction on competition.¹²⁹ Unlike in *Ohio v. American Express Co.*, where the Supreme Court applied the rule of reason test to analyze American Express's antisteering provisions because they constituted a vertical restraint, AEG imposed a horizontal restraint on trade in the open-air festival market by carving out exceptions for other large open-air festivals, which rises to the level of a per se violation.¹³⁰

Coachella's Radius Clause also differs from *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, in which the Supreme Court applied the rule of reason test to decide whether respondent's claim that petitioner's ceasing to sell in respondent's stores due to respondent's policy to "refus[e] to sell to retailers that discount its goods below suggested prices" violated Section 1.¹³¹ The Supreme Court's reasoning that respondent's "rel[iance] on pricing effects absent a further showing of anticompetitive conduct" did not rise to the level of a per se violation is not applicable to Coachella's use of the Radius Clause because Soul'd Out was able to show several instances of anticompetitive conduct detrimental to its business.¹³²

AEG's actions also differ from *Brantley v. NBC Universal*, where

128. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280, 2284 (2018) (stating that all parties consented to a rule of reason analysis because they agreed the antisteering allegations against American Express constituted a vertical restraint on trade); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–87 (2007) (applying the rule of reason test where respondent's attempt to prevent discounted prices was insufficient to show a per se violation of section 1); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1195–96 (9th Cir. 2012) (holding that competition among television channel distributors was not negatively affected where consumers were forced to buy bundled television channel packages).

129. *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 505 (6th Cir. 1983) (quoting *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332 (1982) (explaining that a rule of reason analysis takes into account all details of a case, making it time consuming and expensive to litigate)).

130. *Am. Express Co.*, 138 S. Ct. at 2280; Second Am. Compl., *supra* note 3, ¶¶ 6, 10; *see also* *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (discussing the differences between horizontal and vertical restraints).

131. *See Leegin Creative Leather Prods., Inc.*, 551 U.S. at 885 (declining respondent's reasoning that the per se rule was justified).

132. *See id.* at 885, 899 (holding that the rule of reason test was applicable to decide whether petitioner's ceasing to sell in respondent's stores due to respondent's policy of exclusively selling to retailers at a fixed price violated Section 1 of the Sherman Antitrust Act); *see also* Second Am. Compl., *supra* note 3, ¶ 7.

defendants, television programmers, impaired competition between program television distributors by bundling channels in which they had full or partial ownership, leaving consumers with no choice but to purchase the bundled channels.¹³³ The effects of enforcing Coachella's Radius Clause extend beyond difficulties for the individual consumer, as it leaves the consumers with no way to see their favorite acts other than paying at least \$429 for general admission tickets.¹³⁴ Coachella's Radius Clause could also lead to shutdowns of smaller venues that are unable to book enough acts to remain operational due to a great number of artists being prevented from touring in the area.¹³⁵

Further, unlike in *Brantley* and *American Express Co.*, where all parties agreed the applicable test was the rule of reason, Soul'd Out alleges that Coachella's Radius Clause is a per se violation of Section 1, which makes the rule of reason analysis inapplicable.¹³⁶

Additionally, the rule of reason test is often criticized as costly,¹³⁷ which may contribute to a smaller promoter's inability to bring suit, as exemplified by the disparity in Coachella's and Soul'd Out's sizes and cost of attendance.¹³⁸ The overall effects of Coachella's Radius Clause on the market differentiates it from cases that are reviewed under the rule of reason, bringing it to the level of a per se violation.¹³⁹

e. Coachella's Radius Clause Compared to React's Radius Clause

Soul'd Out's allegations against Coachella are analogous to Eagle's case against React's radius clause. Unlike Coachella, which includes hundreds of artists across multiple genres,¹⁴⁰ React exclusively covers the EDM

133. See *Brantley*, 675 F.3d at 1195–96 (explaining that the rule of reason was not implicated because the requirement to sell both high and low demand channels together did not negatively affect competition).

134. Leonhardt, *supra* note 87.

135. See Second Am. Compl., *supra* note 3, ¶ 37.

136. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)) (“The parties also correctly acknowledge that, like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason.”); *Brantley*, 675 F.3d at 1197.

137. See Stucke, *supra* note 40, at 1462–63, 1465 (explaining that the high amount of “fact-intensive, time consuming, [and] costly” issues relevant in the rule of reason analysis lead to inaccurate and inconsistent results because “[n]either the judiciary nor economic experts have sufficient expertise on the actual workings of the market to accurately assess the likely effects of these nuanced restraints.”).

138. See, e.g., Vagra, *supra* note 86 (discussing the details of Coachella's 2018 festival); Leonhardt, *supra* note 87 (discussing the cost of attending Coachella).

139. Second Am. Compl., *supra* note 3, ¶¶ 54–55, 58.

140. See Fessier, *supra* note 3 (highlighting Coachella's success in 2018).

market.¹⁴¹ Further, React's radius clause "prohibits artists from playing anywhere up to within a 500 mile radius of React's event for periods of 60, 90, or 120 days prior to and following the date of the event,"¹⁴² while Coachella's Radius Clause covers 1,300 miles.¹⁴³ The restricting effects of React's radius clause, even though it doesn't reach as far as Coachella's Clause, are proportional to the smaller EDM market.

Though Eagle alleged that the radius clause was a per se violation of Section 1 of the Sherman Act because it unreasonably prevented many EDM artists from booking shows,¹⁴⁴ React's radius clause presents similar tying and horizontal restraint issues that differentiate Coachella's Radius Clause from *Brantley v. American Express Co.* and *Leegin Creative Leather Products, Inc.*, which were both analyzed under the rule of reason.¹⁴⁵ Under this line of reasoning, both Coachella's and React's radius clauses should be analyzed as per se violations of Section 1 of the Sherman Act.

f. Coachella's Radius Clause Rises to the Level of a Per Se Violation of Section 1 of the Sherman Act

Coachella's overbearing Radius Clause imposes restraints on the live music industry. Smaller and mid-size acts are left without the ability to book venues within driving distance of the major festival.¹⁴⁶ Competing venues may lose out on bookings because artists' tours in the area are typically shorter than the one or two months covered by the radius clause.¹⁴⁷ In addition to harmful effects on artists, their decreased availability causes reduced hard-ticket sales and ultimately reduces the need for concert venues.¹⁴⁸ Artists' decreased availability also limits consumers' choice of when, where, and for how much they can see their favorite artists.¹⁴⁹

141. SFX React-Operating LLC v. Eagle Theater Entm't, LLC, No. 16-13311, 2017 WL 3616562, at *2 (E.D. Mich. Aug. 23, 2017).

142. *Id.* at *1–2.

143. Second Am. Compl., *supra* note 3, ¶ 36.

144. *Id.* ¶ 26.

145. *Id.*; see *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283–85 (2018); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012).

146. See *Bain*, *supra* note 6 (discussing the hazardous and costly circumstances faced by smaller acts when they cannot drive shorter distances between performances).

147. See *id.* (exemplifying how bands and venues lose economic opportunities due to restrictive radius clauses).

148. See Second Am. Compl., *supra* note 3, ¶¶ 89–90 (explaining the negative effects of decreased artist availability on concert venues).

149. See *Gaillot*, *supra* note 7; see also Second Am. Compl., *supra* note 3, ¶ 75 (explaining that radius clauses force an increase in demand for tickets at Coachella because consumers' options for seeing their favorite bands are limited).

Coachella's refusal to let artists advertise other performances in nearby states also harms the potential to draw crowds, harming both artists and smaller venues.¹⁵⁰

Coachella's Radius Clause is a per se violation of Section 1 because it "facially appears to be one that would always or almost always tend to restrict competition and decrease output,"¹⁵¹ and radius clauses "always or almost always tend to restrict competition or decrease output."¹⁵² The effects that an overbearing radius clause has on restricting the success of competing venues and decreasing the availability of available artists are exemplified through both React's and Lollapalooza's radius clauses.¹⁵³ The harm caused by overbearing radius clauses consistently restrains trade; therefore, courts will likely be able to predict with certainty that they violate Section 1.¹⁵⁴ Further, AEG's practice of carving out exceptions to its Radius Clause for competing festivals constitutes a horizontal restraint, which is considered a per se violation of Section 1 when it reduces output or divides markets.¹⁵⁵

Coachella's Radius Clause is comparable to Supreme Court cases where horizontal restraints were found to be per se violations of Section 1. Similar to *United States v. Topco Assoc.*, AEG's horizontal carveout for other large festivals is likely a per se violation.¹⁵⁶

AEG's tying of open-air music festivals and hard-ticket concert performances and themed events constitutes a tying agreement, which has been found to violate Section 1.¹⁵⁷ AEG's tying agreement is similar to

150. See Second Am. Compl., *supra* note 3, ¶ 143 ("[E]ach of the performance agreements between [AEG] and the artists that were scheduled to play at Coachella contains the Radius Clause that prohibits them from advertising, publicizing, or leaking any Festival or Themed Event (as defined in the agreements) in the states of California, Nevada, Oregon, Washington, or Arizona between December 15, 2017, and May 7, 2018.").

151. *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003) (citation omitted).

152. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

153. *SFX React-Operating LLC v. Eagle Theater Entm't, LLC*, No. 16-13311, 2017 WL 3616562, at *2 (E.D. Mich. Aug. 23, 2017); Wright, *supra* note 82 (discussing the claim that Lollapalooza's radius clause has decreased business for local venues and promoters).

154. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6–7 (1958).

155. See Second Am. Compl., *supra* note 3, ¶¶ 183, 220; see also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608–09 (1972).

156. See, e.g., *Topco Assocs., Inc.*, 405 U.S. at 608–09 (holding that Topco's market dividing scheme of allowing its members to use licenses granted by Topco to restrict competition in their territory was a per se violation of Section 1); see Compl., *supra* note 3, ¶ 298 (alleging that AEG exempting competing music festivals from Coachella's radius clause constitutes a horizontal restraint).

157. See Second Am. Compl., *supra* note 3, ¶ 171 ("AEG asserts that its definition of

Northern Pacific Railway Co. v. United States, where the railway possessed significant economic power, which it used to control large numbers of purchasers and give it preference over its competition.¹⁵⁸ Coachella's tying arrangement is unreasonable because of Coachella's proven dominance over the market for both open-air music festivals and hard-ticket sales.¹⁵⁹

g. *Consequences of Finding Coachella's Radius Clause a Per Se Violation*

A decision to find an overbearing radius clause to be a per se violation of Section 1 of the Sherman Act would have far-reaching effects for smaller acts. If courts found the radius clause to be a per se violation, any similar clauses would be invalidated.¹⁶⁰ Promoters would no longer be able to utilize radius clauses with requirements similar to Coachella's restrictions.¹⁶¹

The industry could implement policies that would limit radius clauses to a state within which a festival is held, or within less than a hundred miles of and the same month as the date of the performance. This would ease the burden on small artists who would no longer need to drive hundreds of miles to reach their next venue.¹⁶²

IV. MODIFIED TEST FOR RADIUS CLAUSES IN THE LIVE MUSIC INDUSTRY AND STATUTORY CHANGES

Based on the serious effects of the tying arrangements and horizontal agreements that stem from Coachella's Radius Clause, it should have been held to be a per se violation of Section 1 of the Sherman Act. As the radius clause lawsuits are only recently becoming more common, an initial standard that balances the rule of reason and per se analyses could be introduced to alleviate the courts' reluctance to find an unfamiliar type of restraint to be a

'festivals' and 'themed events' includes events like the Soul'd Out Music Festival, which does not directly compete with Coachella in the open air music festival market."); *N. Pac. Ry. Co.*, 356 U.S. at 5–7 (holding appellant railroad companies' land lease contracts containing "preferential routing" clauses, which required the lessee to ship anything produced on Defendant's land over its lines, to be a tying arrangement).

158. See *N. Pac. Ry. Co.*, 356 U.S. at 3, 7–8 (explaining that the defendant railroad company owned substantial amounts of land from which clients purchased goods and forced use of its railroad to ship the goods).

159. *Id.* at 6–7; Second Am. Compl., *supra* note 3, ¶¶ 31, 33–34; Rayner, *supra* note 117.

160. *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003) (explaining that per se violations occur when a restraint on trade lowers output and restricts competition in the majority of cases).

161. See *id.*

162. See Bain, *supra* note 6 (explaining that artists are forced to drive unsafe distances between shows to avoid violating overbearing radius clauses).

per se violation.¹⁶³

A modified test would have to be only slightly more forgiving, require more depth than the per se analysis, and still be less burdensome than the costly and vague rule of reason test.¹⁶⁴ A potential modification to the rule of reason could be removing inquiry into procompetitive effects. Effects on Coachella's promoters are not anticompetitive because the festival would likely be profitable without the radius clause.

An already established quick look analysis provides an intermediate standard between the per se analysis and the rule of reason test and requires a less intensive inquiry into the relevant market.¹⁶⁵ Courts turn to the quick looks analysis when "no elaborate industry analysis is required to demonstrate the anticompetitive character" of restraints, such as horizontal agreements or agreements to withhold a particular service.¹⁶⁶ The quick look analysis could be used as the threshold for deciding whether overbearing radius clauses are per se violations of Section 1 until courts accumulate adequate experience in deciding these types of cases.¹⁶⁷

Though the per se test should be the standard for overbearing radius clauses, using the quick look analysis rather than the rule of reason would lessen the need for costly discovery and allow smaller promoters and artists to bring suits against larger players.¹⁶⁸ Smaller promoters and artists are most negatively affected by overbearing radius clauses, and will be in a better position to bring suit if costs are lowered.¹⁶⁹

Along with using a modified test or the quick look analysis in lieu of the rule of reason to establish per se unlawfulness, statutory changes at the state level could also prevent overbearing clauses. The Illinois Attorney

163. See *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983) (explaining that some forms of restraint have been recognized as per se violations of the Sherman Act through the court's prior experience with that particular type of restraint).

164. See Stucke, *supra* note 40, at 1461–65.

165. See *SFX React-Operating LLC v. Eagle Theater Entm't, LLC*, No. 16-13311, 2017 WL 3616562, at *7 (E.D. Mich. Aug. 23, 2017).

166. *Id.* (stating that the quick look analysis "would not require an analysis of the surrounding market").

167. *White & White, Inc.*, 723 F.2d at 504 (stating that "judicial experience" has allowed courts to identify per se violations of Section 1).

168. *SFX React-Operating LLC*, 2017 WL 3616562, at *7; Bain, *supra* note 6. See generally Edward Burnett, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493 (2009) (discussing the efficiencies of the quick look analysis along with its use as a "middle-ground" test for antitrust litigation).

169. See Stucke, *supra* note 40, at 1462–65 (explaining that the rule of reason test is expensive because of the more intricate fact based analysis necessary to complete the test); Bain, *supra* note 6 (highlighting the negative effects on smaller artists and promoters caused by overbearing radius clauses).

General's investigation into Lollapalooza's radius clause shows that there is interest at the state level to prevent restraint on the live entertainment market.¹⁷⁰ For example, a state could require that radius clauses do not cover a geographic area outside the city and do not extend past the week or month of the festival. This would allow artists to freely tour before and after the festival and festivals to ensure consumers who are planning to attend festivals during that time will not be dissuaded from attending.

V. CONCLUSION

Radius clauses have been the industry standard for promoters of large open-air music festivals. These overbearing clauses have been brought to the public attention through lawsuits by smaller competitors who are being harmed by them. *Soul'd Out Productions, LLC v. Anschutz Entertainment Group, Inc.* gives an example of an overbearing radius clause and its harmful effects on the market.¹⁷¹

Coachella's overbearing Radius Clause should have been a per se violation of Section 1 of the Sherman Act; therefore, future cases where festivals have market dominance, overbearing radius clauses should be accepted as violations at face value and no longer require in depth analysis into market conditions. Moving away from the in-depth analysis would allow smaller promoters and artists to bring suits when their businesses are harmed. If per se analysis is initially refused by courts, the quick look analysis should replace the rule of reason as the applicable test in deciding whether radius clauses violate Section 1.

170. See, e.g., Wright, *supra* note 82 (detailing the Illinois Attorney General's investigation into Lollapalooza's use of an overbearing radius clause).

171. See, e.g., Bain, *supra* note 6 (highlighting the harmful effects of an overbearing radius clause).